(5)

No. 90-1014

In the

Supreme Court of the United States

October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards
Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

PAGE

OTHER AUTHORITIES:

No. 90-1014

In the

Supreme Court of the United States

October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

**BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards

associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

REASONS FOR GRANTING THE WRIT

The practice of holding invocations before high school graduation has been a tradition in this country's public high schools since their inception. The conflict in the lower courts together with the perceived conflict between this Court's school prayer decisions on the one hand and decisions such as Marsh v. Chambers, 463 U.S. 783 (1983), on the other, leave schools on the horns of a dilemma. On the one hand, should they follow tradition and risk a lawsuit or on the other, follow the safer legal ground and

risk the profound displeasure of a majority of their constituents who argue, whether rightly or wrongly, that U.S. Supreme Court decisions do not require the elimination of invocations and benedictions from graduation ceremonies.

ARGUMENT

Introduction.

For many years, NSBA has had a standing policy supporting the constitutional principle of the separation of church and state. In addition, NSBA's current resolution on prayer and silent meditation in public schools states:

> NSBA opposes state and federally mandated prayer or silent meditation in the public schools.

On the question of invocations at high school graduations, however, school boards are not of one mind. Some believe that non-denominational inspirational messages at graduations where parents are present do not raise questions of separation of church and state and, indeed, add an appropriate

solemnity to the proceedings. Others believe that this Court's prayer decisions require a result similar to that below and further believe that, as a matter of policy, invocations should appropriately be left in the churches. Because of this philosophical disagreement among its members, NSBA will not take a position on the merits of this case in the event that the Court agrees to hear the issue. However, Amicus does distance itself from the arguments in the Petitioners brief to the extent the analysis calls into question this Court's decisions concerning the use of public resources or personnel. See, e.g., Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973). Amicus believes that this Court could reach a decision favorable to Petitioners without necessarily agreeing with Petitioners' substantive analysis.

Regardless of the lack of consensus on the merits, however, NSBA's members agree that there is a need for clarity in this area which can only be provided by a decision by this Court on the issue. Wherever particular school boards might stand on the substantive issue, they agree that the public expects the tradition of graduation invocations to continue in the absence of clear case law to the effect that the practice is unconstitutional. That clarity does not exist.

I. Invocations and benedictions at graduation ceremonies are a widespread tradition in public high schools.

Graduation day signifies more to the graduate and his or her family than the day diplomas are distributed.

> Commencement is an impressive and memorable occasion in every secondary school in the United States. It represents the achievement of a goal that students, their parents, and their teachers have worked long and hard to attain. The ritual that surrounds the commencement ceremony bespeaks the

> significance and dignity Americans place on this very important moment in the life of every student who graduates.

Owen B. Kiernan, Forward to NASSP Commencement Manual, Seventh Revised Edition (1975) (hereinafter Commencement Manual).

High school graduation exercises in this country have remained much the same for many years. The solemnity of the occasion has called for a tradition of dress, program substance and ceremony, which includes an invocation and a benediction.

The Commencement Manual reproduced the commencement program for a high school in Norwich, Connecticut held on July 21, 1868. The program in Norwich differed from the type of program one would see today with its inclusion of speeches on subjects such as "True Manliness" and "Women's Sphere and Rights" and a "prayer," but other features of that 1868 commencement remain much the same today -- particularly the invocation. Just as

in 1868, the typical high school commencement program today includes an invocation, some kind of student participation, music, commencement address(es), announcement of awards and presentation of diplomas. One major difference between graduation ceremonies in 1868 and current exercises is the site; in 1868 graduation exercises were usually held in a church, rather than on school property as they often are today. The religious location may have led to the practice of holding baccalaureate services in conjunction with graduation.

According to a 1974 study conducted by the NASSP, 61 percent of the reporting schools in that year held baccalaureate services. Commencement Manual, at 43. Attendance at the service was mandatory in 31 percent of those schools. Schools that held a baccalaureate conducted it in a variety of places including schools, civic auditoriums, outdoor stadiums and churches. The NASSP report cited the case

of Wiest v. Mt. Lebanon S.D., 457 Pa. 166, 820 A.2d 302, cert. denied, 419 U.S. 967 (1974), for the proposition that baccalaureate services passed muster under both the establishment and free exercise clauses because they "would not have any coercive effect upon appellants in the practice of their religion."

The NASSP manual does not discuss the legality of invocations probably because it had not yet been raised as a problem in 1974. Every commencement program shown in the report included an invocation and the discussion by an expert also included an invocation as part of the "typical" graduation exercise. G.K. Stewart, "Reflections from a Commencement Speaker," Commencement Manual, at 18-19.

Some schools still hold a formal baccalaureate service, but others leave that activity to the local churches, depending on parental and student attitudes toward the holding of a service. However, both the

invocation led by local clergy and the benediction also led by local clergy continue to be included as features in the typical graduation ceremony. NASSP, "Commencement -- Planning the Graduation Exercises," The Practitioner, Vol. XII, No. 2, at 6 (December 1985).

Prior to this Court's school prayer decisions, Engel v. Vitale, 370 U.S. 421 (1962), Abington v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980); Wallace v. Jaffree, 472 U.S. 38 (1985), most public high schools, particularly in the South, held Christian baccalaureate services before graduations. After these decisions, many schools discontinued the practice of holding such services and began using instead ecumenical invocations, in the belief that these pronouncements solemnize the occasion but assure that no student feels alienated from the process.

After the prayer decisions, a great deal of dismay arose in particular areas of the country about the Court's action. After Schempp, the Congress even held hearings on the matter in response to proposed amendments to the Constitution relating to school prayer. In other quarters, the decisions were resoundingly endorsed by many school board members and other school officials:

> Nothing in the Court's ruling removes from the schools the freedom and the obligation to treat religion as a very large force in our civilization. Nothing in the ruling suggests that teachers and children must pretend to be agnostics between the opening and closing bells.
>
> The Constitution now forbids ritual. It insures freedom for all individuals, pupils and teachers, to exercise their private beliefs, short of ritual, different though those beliefs many be. Let us not change it.

Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the Committee on the Judiciary House of Representatives (Testimony of Sidney P.

Marland, Jr., then Superintendent of Schools, Pittsburgh, Pa., later U.S. Commissioner of Education, Department of Health, Education and Welfare), 88th Cong. 2d Sess. 1458 (1964) (hereinafter, Hearings).

Yet even in school districts in favor of the school prayer decisions, invocations continued to be a part of the typical graduation ceremony although changes were made in their format. Many school boards made a number of changes in their practices: the invocations are required to be non-denominational, some schools choose student leaders to write and deliver the invocations and in others, the ceremonies are led by religious leaders on a rotating basis so that preference is never given to any particular religion, students are allowed to opt out of the graduation and as always, parents and friends are in attendance. The 1975 NASSP report noted that graduation attendance requirements in general have become more

relaxed with only 56 percent of schools requiring graduating students to attend. Today, most high school graduation ceremonies are offered on a voluntary basis.

II. Current case law does not provide clear guidance to school districts on the constitutionality of graduation invocations and benedictions.

Until the recent lower court decisions were rendered, school boards believed that their policies regarding invocations did not contravene this Court's school prayer decisions.

This feeling may have been based on a widespread perception, whether right or wrong, that this Court's school prayer decisions do not apply in the context of a public event such as a high school graduation. This perception probably derived from a substantial amount of case law, which arguably may be in error but nevertheless exists.

In Brandon v. Board of Educ. of Guilderland Cent. Sch., 635 F.2d 971, 979 (2d

Cir. 1980), ruled that allowing student prayer groups violates establishment of religion principles (a proposition overturned by this Court in the case of Westside Community High School v. Mergens, 110 S.Ct. 2356 (1990)), but the court in dictum distinguished the practice of a "clergyman briefly appear[ing] at a yearly high school graduation ceremony [where] no image of official state approval is created." In Grossberg v. Deusebio, 380 F. Supp. 285, 288 (E.D. Va. 1974) the court noted that "invocations similar to those at issue here have dotted our history from our country's inception. Invocations are commonplace in the legislative chambers of both state and federal government and at celebrations of public holidays such as Thanksgiving and Memorial Day." The opinion in Grossberg, decided before Marsh v. Chambers and Lemon v. Kurtzman, 403 U.S. 602 (1971), held that the practice of holding high school invocations did not have a religious purpose

or effect. The case cites three other decisions which found invocations in public ceremonies permissible -- Wiest v. Mt. Lebanon School District, supra, Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968), and Wood v. Mt. Lebanon Township School Dist., 342 F.Supp. 1293 (W.D. Pa. 1972).

Two more recent cases have reached similar results. In Sands v. Morongo Unified School District, 262 Cal. Rptr. 452 (Cal. Ct. App. 4th Dist. 1989), review granted, 264 Cal. Rptr. (Cal. Sup. Ct. 1989), the California court of appeals upheld the practice of conducting high school invocations and in Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that Marsh v. Chambers applies to high school invocations.

The practice of holding invocations and benedictions is not limited to states that had, prior to this Court's school prayer decisions, a tradition of prayer in the

schools. California, for example, has never had a history of prayer in the schools. In 1964 the Committee on the Judiciary of the House of Representatives held hearings on proposed amendments to the Constitution relating to prayers and Bible reading in the public schools. The then-President of the California State Board of Education Thomas W. Braden testified against the amendments, stating "the members of our board believe that our teachers are competent to distinguish between teaching about religion and conducting compulsory worship." Mr. Braden testified that to his knowledge, prior to the Supreme Court's decision in Engel v. Vitale in 1962 no public school in California had the practice of reciting prayers or reading of the Bible in any public school. Hearings, at 1500.

In 1989 in the Sands case the California Court of Appeals had occasion to review the apparently long-standing practice of conducting invocations and benedictions at

several high schools in San Bernardino County. These California schools, like most other schools across the country, did not perceive the practice of invocations at a public ceremony as analogous to the reciting of prayers in the classroom. The court held that Marsh v. Chambers does not apply to the schools, but nevertheless, the use of invocations is constitutional because it meets the three-pronged test of Lemon v. Kurtzman.

However, a number of other courts have overturned the practice of using invocations before graduation ceremonies, putting school boards in a quandary as to their graduation practices. See, e.g., Lundberg v. West Monona Community School Dist., 731 F. Supp. 331 (N.D. Iowa 1989) (denied preliminary injunction to students and parents who wanted to compel school to include public prayer in graduation ceremony); Graham v. Central Community School Dist., 608 F. Supp. 531 (S.D. Iowa 1985); Doe v. Aldine Indep. School Dist., 563 F.Supp. 883

(S.D.Tex. 1982); Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); Kay v. David Douglas School Dist., 79 Or. App. 384, 719 P.2d 875 (1986), rev'd on other grounds, 303 Or. 574, 738 P.2d 1389 (1987), cert. denied, 484 U.S. 1032.

Then in 1990 this Court decided Westside Community Schools v. Mergens, upholding the constitutionality of the Equal Access Act's requirement that a school that allows any noncurriculum related student club to meet during noninstructional time must allow all student clubs -- including religious clubs -- to meet on the same terms and conditions.

The Court did not address the issue of school sponsored prayer and, in fact, at least one of the concurrences expressed grave concerns about how school districts should implement the Equal Access Act without appearing to sponsor religious activities. Nevertheless, since Mergens there has been a wide public perception among school officials,

parents and students that Mergens constituted a chink in the armor of the Court's prayer in the schools decisions. For example, the headlines in several newspapers characterized Mergens as a school prayer case. An Associated Press story in the Baltimore Evening Sun stated, "Fundamentalists cheer high court's school-prayer ruling." The headline in the Oneonta, New York Daily Star read, "Prayer groups allowed to worship at school." The San Diego Tribune "Public-school prayer groups gain Supreme Court blessing." The Boca Raton, Florida News informed its readers, "Court OKs school prayer clubs."

The misperception that Mergens grants students the right to engage in religious activities at school, other than the right of access to school facilities permitted to other noncurriculum related student groups, is being perpetuated by certain Christian advocacy groups. For example, Jay Alan Sekulow, General Counsel for Christian Advocates

Serving Evangelism (C.A.S.E.) (and counsel for respondents in Mergens) has asserted that "the 'wall of separation' between church and state has begun to crumble . . . [T]he Mergens case has opened up high schools for [gospel] tract distribution." J. Sekulow, "Running the Race," C.A.S.E. (1990). Sekulow opines that "in Mergens the Court reinforced students' rights to evangelize on the high school campus." "A Field for the Harvest," C.A.S.E. (1990). Predicting that "distribution of Christian literature will be the legal issue of the 1990's" St. Petersburg Times, Sept. 22, 1990, Sekulow has already been involved in at least one case challenging school officials' decision to bar dissemination of Christian literature.

In the face of such interpretations of Mergens and other court decisions, school officials must formulate policy concerning not only distribution of religious literature but also the use of invocations and benedictions

at graduation ceremonies. Clearly, guidance from this Court is needed so that schools can ensure that their practices do not overstep constitutional bounds.

Respectfully submitted,

Gwendolyn H. Gregory
Counsel of Record
Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

August W. Steinhilber
NSBA General Counsel

Thomas A. Shannon
NSBA Executive Director